McNamee, Lochner, Titus & Williams, P.C.

ATTORNEYS AT LAW

Memorandum

To: Sharon Kivowitz

From: John Privitera
Dana Stanton
McNamee, Lochner, Titus & Williams, P.C.

Date: June 18, 2014

Re: 89 Frost Street contamination: Adchem Corporation's Liability

I. Introduction

In the 1960's and 1970's, three Brothers – Joseph Pufahl, Charles Pufahl and Herman Pufahl (the "Pufahl Brothers") – owned, directed and managed a group of companies called the Lincoln Processing Group. The Lincoln Processing Group consisted of several entities, including but not limited to: Adchem Corporation, Lincoln Processing Corporation and three real estate companies – Pufahl Realty Corporation, Northern State Realty Corporation and Northern State Realty Company. Lincoln Processing Corporation was in the business of textile lamination and bonding. Adchem Corporation manufactured the chemicals for Lincoln's textile business. Both Lincoln Processing Corporation and Adchem Corporation operated on locations that were leased to them by the three real estate divisions.

Pufahl Realty Corporation changed its name to Northern State Realty Corporation in 1969, and reorganized as a partnership by the name of Northern State Realty Company in 1973. The Pufahl Brothers admitted in sworn deposition testimony that Pufahl Realty Corporation, Northern State Realty Corporation and Northern State Realty Company (collectively, "NSR") are

the same entity. Northern State Realty Co. was a general partnership comprised of the Pufahl Brothers, resulting in personal liability for the Pufahl Brothers.

II. Direct Operator Liability

A. Lincoln Processing Corporation Has Direct Operator Liability Under CERCLA

Lincoln Processing Corporation has direct operator liability under CERCLA. From 1966 to 1972, Lincoln Processing Corporation conducted a textile lamination operation at 89 Frost Street and utilized PCE in its operations. According to sworn deposition testimony by former Lincoln Processing Corporation employees, Lincoln Processing Corporation conducted dry cleaning operations at 89 Frost Street and used between one and two 55 gallon drums of perchloroethylene (PCE) per month. Additionally, Lincoln Processing Corporation may have used PCE in other operations at the 89 Frost Street Site. For example, PCE and/or tetrachloroethylene (TCE) were used to clean the manufacturing equipment at 89 Frost Street. Residual PCE contained the fabrics being cleaned by Lincoln Processing Corporation at 89 Frost Street may have been released in the cleaning process. Finally, organic solvents may have been released as a result of the use of the scouring equipment; the scouring machine could have released PCE to the subsurface at the Frost Street Sites if it was used to scour fabrics that had previously been cleaned with PCE. (Expert Report of Todd Cox at p. 4 (July 17, 2013)).

B. Adchem Corporation Has Direct CERCLA Operator Liability Because it Engaged in a Joint Venture with Lincoln and NSR to Conduct Manufacturing Activities at 89 Frost Street and Sublet 89 Frost Street to Earn a Profit for the Pufahl Brothers.

An affiliated company can be held directly liable for pollution under CERCLA when the affiliated company operates a polluting facility in the stead of its affiliate or alongside its affiliate in "some sort of a joint venture." United States v. Bestfoods, 524 U.S. 51, 71 (1998).

A joint venture is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge. In re Cohen, 422 B.R. 350, 377 (E.D.N.Y. 2010). The elements of a joint venture are: (1) the existence of a specific agreement between two or more persons to carry on an enterprise for profit; (2) evidence in the agreement of the parties' intent to be joint venturers; (3) a contribution of property, financing, skill, knowledge, or effort by each party to the joint venture; (4) some degree of joint control over the venture by each party; and (5) the sharing of both profits and losses. Itel Containers Int'l Corp. v. Atlanttrafik Exp. Service Ltd., 909 F.2d 698, 701 (2d Cir. 1990). There need not be an explicit agreement between the entities, but there must be evidence that the parties joined their property, interests, skills and risks with the intention of becoming a joint venture. Fetter v. Schink, 902 F. Supp. 2d 399, 404 (S.D.N.Y. 2012).

Here, the entities comprising the Lincoln Processing Group were engaged in a joint venture. Although there was not an explicit agreement to engage in a joint venture, the actions of the entities comprising the Lincoln Processing Group show that the entities joined their property, interests, and skills to earn a profit. The Lincoln Processing Group established Lincoln Processing Corporation in 1961. Lincoln Processing Corporation was in the business of textile bonding and lamination. The Lincoln Processing Group formed Adchem Corporation in 1965 for the sole purpose of manufacturing the adhesive chemicals for Lincoln Processing Corporation to use in its textile lamination and bonding operations. Also in 1965, the Lincoln Processing Group established NSR and its predecessors Pufahl Realty Corporation and Northern State Realty Corporation for the purpose to lease and own the properties on which Lincoln Processing

Corporation and Adchem Corporation operated. This vertical integration shows the Lincoln Processing Group's intention to earn a profit for the Lincoln Processing Group as a whole.

The Pufahl Brothers owned and had complete and unfettered control over the all the entities in the Lincoln Processing Group. As Lincoln Processing Group utilized combined financial statements, all profits and losses were born by the Lincoln Processing Group.

Additionally, the entities routinely transferred assets to one another without any consideration, and routinely paid for one another's financial obligations, demonstrating that they combined their property to engage in a joint venture, and intended to share in the profits and losses. For example, Lincoln Processing Corporation originally leased the 625 Main Street site in 1964, but in 1965, Lincoln Processing Corporation assigned the lease to NSR, who then sublet 625 Main Street back to Lincoln Processing Corporation. NSR also leased 625 Main Street to Adchem Corporation from 1965 until 1975, when NSR assigned the lease to Adchem Corporation for no consideration. Prior to the 1975 assignment of 625 Main Street, Adchem Corporation paid the rent directly to the landlord on behalf of NSR.

NSR also leased the 85 New York Avenue site to Adchem Corporation, and eventually assigned the lease to Adchem Corporation for no consideration. Adchem Corporation gained a substantial financial benefit for which it did not pay for. Prior to the assignment, Adchem Corporation paid NSR $17,040 per year to sublet the property. After the assignment, Adchem Corporation only had to pay $9,169 per year directly to the landlord. This resulted in a $7,871 per year benefit from 1975 until Adchem Corporation vacated the premises in 1984. The total financial benefit to Adchem Corporation over the nine year period was $70,839.

The Lincoln Processing Group entities routinely shared employees. When employees were traded back and forth between Lincoln Processing Corporation and Adchem Corporation,

the employees were paid with only one cash envelope, the method of payment did not change, and the person handling the payment did not change. (Deposition of Obdiah Goodman at 14:1-11 (Sept. 17, 2013); Deposition of Lloyd Leary at 14:21-15:10, 45:21-46:18 (Sept. 18, 2013)).

NSR (and its predecessors Pufahl Realty Corporation and Northern State Realty Corporation) did not even compensate its officers – the Pufahl Brothers – because the Pufahl Brothers were compensated by Lincoln Processing Corporation and Adchem Corporation for their work on behalf of NSR. Joseph Pufahl's son, John Pufahl, conducted work on behalf of NSR, but was not compensated by NSR. Instead, John Pufahl was compensated by Adchem Corporation for his work performed for NSR.

The actions of the entities comprising the Lincoln Processing Group demonstrate an intention to engage in a joint venture. Thus, Adchem Corporation has direct operator liability as a joint venturer with Lincoln Processing Corporation.

C. Adchem Corporation Has Direct CERCLA Operator Liability As Lincoln Processing Corporation's Successor

Adchem Corporation is directly liable under CERCLA because it is Lincoln Processing Corporation's successor. See New York State Elec. & Gas Corp. v. FirstEnergy Corp., 808 F. Supp. 2d 417, 491 (N.D.N.Y. 2011). Adchem Corporation is Lincoln Processing Corporation's successor. See New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 206 (2d Cir. 2006). When Lincoln Processing Corporation's business began to wind down in 1972, Lincoln Processing Corporation sold most of its assets. Not all assets sold or disposed of were included on lists of sold equipment. (Deposition of Charles Pufahl at 217:4-220:5 (Jan. 8, 2014)). Some of those assets are believed to have been acquired by Adchem Corporation. In addition, in 1975, Lincoln transferred a life insurance policy on Joseph Pufahl to Adchem Corporation without consideration. (Deposition of John Pufahl at 228:25-230:8 (April 8, 2013); Deposition of

Charles Pufahl at 78:18-80:14 (Jan. 16, 2013)). Lincoln Processing Corporation also transferred other life insurance policies on the Pufahl Brothers to NSR in 1975 without any consideration. After Lincoln Processing Corporation dissolved, Adchem Corporation continued to prosper and conduct business under the same ownership and management as Lincoln Processing Corporation.

III. Indirect CERCLA Ownership Liability

Adchem Corporation has indirect CERLCA liability because it is affiliated with NSR, which has direct ownership liability under CERCLA. In 1966, NSR's predecessor (Pufahl Realty Corporation) leased the site at 89 Frost Street from the landlord, Jerry Spiegel. The parties executed a lease-purchase agreement that gave NSR enough indicia of ownership to establish *de facto* ownership under Commander Oil v. Barlo Equipment Company, 215 F.3d 321, 330-331 (2d Cir. 2000), Cert denied, 531 U.S. 979 (2000). This issue was briefed by the parties in Next Millennium Realty, LLC and 101 Frost Street Associated v. Adchem Corp., CV-03-5985 (E.D.N.Y.). The plaintiffs' Memorandum of Law in Support of Partial Summary Judgment, dated Jan. 28, 2014, is attached to this memo.

Under the terms of the lease, the landlord built a manufacturing building according to the Lincoln Processing Group's specifications, for Lincoln Processing Corporation to use for its textile bonding and lamination operations. The lease was for a long term of 20 years. The landlord did not have the right to terminate the lease early, except if the building was destroyed by fire. NSR had exclusive possession of the site. NSR had the right to sublet the premises without the consent of the landlord. NSR was responsible for all taxes, insurance, assessment, operation and maintenance costs. NSR was responsible for all structural and non-structural repairs and for the repair of all damage caused by Tenant. However, since the landlord built the

building for NSR, as the general contractor of the building, the landlord guaranteed that the major structural components of the building would be sound for the entire term of the lease.

The lease-purchase agreement contained an option to buy the property after twelve years, which the Lincoln Processing Group desired to exercise.

In 1973, NSR sublet 89 Frost Street to Marvex Processing and Finishing Corporation (Marvex). NSR did not seek the landlord's consent for this sublease. NSR chose Marvex as the tenant. NSR profited substantially from the sublease with Marvex. The landlord did not receive any proceeds from the sublease.

Marvex released PCE through its operation of a dry cleaning machine that utilized PCE, and as a result of a fire in 1976 that ruptured the PCE storage tank. The Pufahl Brothers regularly visited Marvex's industrial operations and knew that Marvex operated a dry cleaning machine and stored PCE on site.

By the terms of the lease and the circumstances of the NSR's sublease to a polluting subtenant, NSR is directly liable as a *de facto* owner. Since Adchem Corporation is affiliated with NSR, Adchem Corporation is indirectly liable as an owner and Adchem Corporation's assets can be reached by piercing the corporate veil.

IV. The Corporate Veil Can Be Pierced to Reach Adchem Corporation

Adchem Corporation's assets can be reached by piercing the corporate veil, because the Lincoln Processing Group operated as a single entity. S. New England Tel. Co. v. Global NAPs Inc., 624 F.3d 123, 131 (2d Cir. 2010). Adchem Corporation has indirect CERCLA liability because it is affiliated with Lincoln Processing Corporation, which has direct operator liability, and NSR, which has direct owner liability. Affiliated entities may be held liable for each other's financial obligations by piercing the corporate veil. Wm. Passalacqua Bldrs., Inc. v. Resnick

Devlprs. S., Inc., 933 F.2d 131, 138-39 (2d Cir. 1991). All of the factors enumerated in Passalacqua for piercing the corporate veil are met.

1. Common Ownership and Control

Three brothers – Joseph Pufahl, Charles Pufahl and Herman Pufahl (the "Pufahl Brothers") – were the owners, officers and directors of the entities comprising the Lincoln Processing Group. (Deposition of Charles Pufahl at 22:4-23:7 (Jan. 16, 2013); Deposition of John Pufahl at 25:21-26:4, 63:21-65:8 (April 8, 2013); Combined Financial Statements of Lincoln Processing and Related Companies Sept. 30, 1968, at pp. AA01527, AA01545-48 (hereinafter "Combined Financial Statements")). Lincoln Processing Group held itself out to the public as being a single entity. (Testimony of Elliot Miller, Esq. before the Westbury Water District, May 15, 1968 ("I am here as the attorney for a group of corporations in Westbury known as Lincoln Processing Group which include approximately eight affiliated corporations….")).

2. Lack of Corporate Formalities.

Adchem Corporation, Lincoln Processing Corporation, and NSR lacked corporate formalities. Shareholder meetings of the companies were informal and were not called pursuant to formal shareholder meeting notices. (Deposition of Elliot Miller at 18:15-19:7 (Oct. 15, 2013)). Similarly, there were no formal meetings of the Board of Directors. (Miller Dep. at 19:10-18). Additionally, there is no affirmative evidence that all of the companies had shareholder or partnership agreements at all relevant times.

3. Assets Were Routinely Transferred Between The Companies For No Consideration.

The companies routinely transferred equipment and assets between the various entities with no consideration. One reason for the transfer of assets with no consideration was that all of

profit from all of the companies went to the same three individuals – the Pufahl Brothers – and source of the profit was considered by them to be immaterial. (Charles Pufahl Dep. at 24:8-25:14, 26:14-21; John Pufahl Dep. at 203:5-208:20, 222:6-224:15; Miller Dep. at 105:1-106:6. ("Q: The question is, was any consideration paid for the asset transfer? A: I don't recall, but it doesn't matter because substantively the economic effect was the same. You had the same three principals as the partners, as the shareholders of the corporation. So if the three Pufahls, as partners, paid the corporation and that corporation was dissolved, the money would then go back to the three Pufahls as shareholders of the corporation.")).

The Lincoln Processing Group routinely transferred the leases between the various companies. In addition to the property at 89 Frost Street, NSR leased properties located at 625 Main Street and 85 New York Avenue. Lincoln Processing Corporation originally leased 625 Main Street in 1964, but in 1965, Lincoln Processing Corporation assigned the lease to NSR, who then sublet 625 Main Street back to Lincoln Processing Corporation. NSR also leased 625 Main Street to Adchem Corporation from 1965 until 1975, when NSR assigned the lease to Adchem Corporation for no consideration. Prior to the 1975 assignment of 625 Main Street, Adchem Corporation paid the rent directly to the landlord on behalf of NSR.

NSR also leased the 85 New York Avenue site to Adchem Corporation. In 1975, NSR assigned the lease to Adchem Corporation for no consideration. When the lease for 85 New York Avenue was assigned to Adchem Corporation, Adchem Corporation received the favorable lease terms paid by NSR without paying for this financial benefit. Prior to the assignment, Adchem Corporation paid NSR $17,040 per year to sublet the property. After the assignment, Adchem Corporation only had to pay $9,169 per year directly to the landlord. This resulted in a

$7,871 per year benefit from 1975 until Adchem Corporation vacated the premises in 1984. The total financial benefit to Adchem Corporation over the nine year period was $70,839.

4. Employees Were Shared By The Companies Comprising the Lincoln Processing Group.

The Lincoln Processing Group routinely shared employees among the various entities. (Leary Dep. at 14:7-18:25; Obdiah Goodman Dep. at 11:7-14:4). NSR was a shell company with no employees of its own. NSR shared officers, directors and personnel with Lincoln Processing Corporation and Adchem Corporation. NSR did not even compensate its officers – the Pufahl Brothers – because the Pufahl Brothers were compensated by Lincoln Processing Corporation and Adchem Corporation for their work on behalf of NSR. NSR used a Lincoln Processing Corporation employee, Natalie Provenzano, to perform administrative functions. The record lacks any affirmative proof that NSR compensated Lincoln Processing Corporation for the use of Lincoln Processing Corporation's employees. Joseph Pufahl's son, John Pufahl, conducted work on behalf of NSR, but was not compensated by NSR. Instead, John Pufahl was compensated by Adchem Corporation for his work performed for NSR.

5. Inadequate Capitalization.

Money flowed from Lincoln to Adchem Corporation. The reimbursement to Adchem Corporation's petty cash fund was made by Lincoln Processing Corporation's staff. (Lincoln Processing Corp. & Related Companies Survey of Internal Control, June 1969, at p. AA006860 (hereinafter "1969 Audit"); John Pufahl Dep. at 293:14-20). Additionally, the Lincoln office manager would replenish Adchem Corporation's freight checking account. (1969 Audit at p. AA006860). All of the companies used the same accounting firm and utilized combined financial reporting. (See Combined Financial Statements). Additionally, the Pufahl Brothers set

pricing and transferred funds between the companies to effectuate the meeting of the companies' financial obligations. (1969 Audit at p. AA006841; John Pufahl Dep. at 298:12 23).

6. The Pufahl Brothers Borrowed Money From Lincoln and/or Adchem, and Corporate Records Do Not Exist For Those Transactions

The Pufahl Brothers borrowed money from Lincoln Processing Corporation and/or Adchem Corporation. (Miller Dep. at 68:6-18). It is not clear from the record whether records were kept or whether interest was paid.

7. The Lincoln Processing Group Shared Common Office Space, Address and a Centralized Telephone

The companies shared the same administrative office space and staff at 89 Frost Street; bookkeeping, order entry, payroll, mail, central telephone and other office functions for each of the companies was conducted at the same administrative office at 89 Frost Street. (John Pufahl Dep. at 23:18-24:17; 1969 Audit at pp. AA006832-69, AA006858).

Although it was not a subtenant at 89 Frost Street, Adchem Corporation regularly used the conference room and office space at 89 Frost Street. There is no evidence that Adchem Corporation compensated NSR Co. or Lincoln Processing Corporation for its use of the 89 Frost conference room and its proportional share of the Pufahl Brothers' offices at 89 Frost. (John Pufahl Dep. at 24:4-25:20; Elliot Miller Dep. at 117:14-119:6.) There are no records of payment, and the living witnesses do not have first-hand knowledge of any payments.

Adchem Corporation utilized Lincoln Processing Corporation's office staff for billing, receipt of monies and payment of bills. (1969 Audit at p. AA006858; Deposition of John Pufahl at 264:2-11 (Feb. 4, 2014)). There is no evidence that Adchem Corporation compensated Lincoln Processing Corporation for its use of Lincoln's staff. (John Pufahl Dep. at 24:18-24:9). Reimbursement to Adchem Corporation's petty cash fund was made by Lincoln Processing

Corporation's staff. (1969 Audit at p. AA006860; John Pufahl Dep. at 293:14-20) The Lincoln Processing Corporation office manager would replenish Adchem Corporation's freight checking account. (1969 Audit at p. AA006860).

8. The Entities in the Lincoln Processing Group Did Not Deal With Each Other At Arm's Length

Adchem Corporation supplied chemicals for Lincoln Processing Corporation's textile lamination business. Transfers of chemicals between Adchem Corporation and Lincoln Processing Corporation were done on a "very informal basis." (1969 Audit at p. AA006856). No formalities were observed, nor were records kept of transfers of chemical from Adchem Corporation to Lincoln Processing Corporation. Intercompany transactions between Adchem Corporation and Lincoln Processing Corporation were done without any purchase orders or receiving slips or records. (1969 Audit at p. AA006841-42). Lincoln Processing Corporation picked up chemicals at Adchem Corporation "daily without the benefit of order, receiving slip or other record." (1969 Audit at p. AA006840). "Intercompany or affiliated company invoices have no purchase orders or receiving slips indicating their propriety." (1969 Audit at p. AA006841). When Adchem Corporation processed an order from an outside customer, Lincoln Processing Corporation performed the billing, but no paperwork was maintained to indicate to Adchem Corporation that the billing had been performed. (1969 Audit at p. AA006860).

The Pufahl Brothers set pricing and transferred funds between the companies to effectuate the meeting of the companies' financial obligations. (1969 Audit at p. AA006841; John Pufahl Dep. at 298:12 23). Negotiations between the Adchem Corporation and Lincoln Processing Corporation were not done at arm's length; the prices of Adchem Corporation's chemicals were set by Joseph Pufahl's son (John Pufahl) and the quality control personnel at Adchem Corporation. (1969 Audit at p. AA006841).

9. The Companies Were Not Treated As Independent Profit Centers

The companies had the same attorney and accountant. The accountant specifically set aside any intercompany distinctions in the consolidated financial reports. (Combined Financial Statements at AA01524-35). The 1969 Audit specifically notes a lack of appropriate separation. (1969 Audit at AA006841-42, AA006860).

10. Payment or Guarantee of Debts

NSR leased 625 Main Street to Adchem Corporation from 1965 until 1975, when NSR assigned the lease to Adchem Corporation for no consideration. However, prior to the 1975 assignment of 625 Main Street, Adchem Corporation paid the rent directly to the landlord on the behalf of NSR.

When Lincoln Processing Corporation was winding down its affairs in 1975, Lincoln changed the beneficiary and owner of certain term life insurance policies on Joseph Pufahl to Adchem Corporation and other such policies on the Pufahl Brothers to NSR; upon those changes, the recipient entities assumed payment of all premiums on the policies.

When employees were traded back and forth between Lincoln Processing Corporation and Adchem Corporation, the employees were paid with only one cash envelope, the method of payment did not change, and the person handing them the payment did not change. (Goodman Dep. at 14:1-11; Leary Dep. at 14:21-15:10, 45:21-46:180).

11. Lincoln Processing Group Used 89 Frost Street As If It Was Their Own Property

In addition to the utilization of 89 Frost Street described above, during the 1977 litigation with Jerry Spiegel, all the companies comprising the Lincoln Processing Group signed the settlement documents as Lessees of 89 Frost Street.

12. Evidence of Wrong-doing

PCE pollution is inherent in dry cleaning operations. Lincoln Processing Group's decision to use a dry cleaner in Lincoln Processing Corporation's manufacturing operations at 89 Frost Street, and Lincoln Processing Group's decision to sublet to a dry cleaner (Marvex), were, in effect, decisions to pollute the 89 Frost Street site. See Rochester Gas & Elec. Corp. v. GPU, Inc., 355 F. App'x 547, 550 (2d Cir. 2009) (piercing the corporate veil and finding a direct nexus between the parent company's domination of the subsidiary and the subsidiary's pollution of the site because coal tar pollution was an inevitable byproduct of manufactured gas production and that the parent company's decision to produce gas was, in effect, a decision to pollute).

V. Conclusion

Adchem Corporation has both direct and indirect liability under CERCLA. Adchem Corporation is directly liable under CERCLA because it is the successor of Lincoln Processing Corporation, which polluted the 89 Frost Street site by operating a dry cleaning machine that utilized PCE. Adchem Corporation is directly liable under CERCLA because it engaged in a joint venture to profit from the polluting manufacturing activities conducted at 89 Frost Street.

Additionally, Adchem Corporation is indirectly liable under CERCLA because the Lincoln Processing Group operated as a single entity. Adchem Corporation's assets can be reached by piercing the corporate veil because Adchem Corporation is affiliated with NSR, which has direct ownership liability under the Commander Oil test. Adchem Corporation's assets can also be reached by piercing the corporate veil because Adchem Corporation is affiliated with Lincoln Processing Corporation, which polluted 89 Frost Street as an operator.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NEXT MILLENNIUM REALTY, L.L.C., and 101 FROST STREET ASSOCIATES,

Plaintiffs,

- against -

ADCHEM CORP., LINCOLN PROCESSING CORP., NORTHERN STATE REALTY CORP., NORTHERN STATE REALTY CO., and PUFAHL REALTY CORP.,

Defendants,

ADCHEM CORP., LINCOLN PROCESSING CORP., NORTHERN STATE REALTY CORP., NORTHERN STATE REALTY CO., and PUFAHL REALTY CORP.,

Third-Party Plaintiffs,

- against -

THE ESTATE OF JERRY SPIEGEL, and ALAN EIDLER, PAMELA SPIEGEL SANDERS, and LISE SPIEGEL WILKS, AS EXECUTORS OF THE ESTATE OF JERRY SPIEGEL,

Third-Party Defendants.

Case No. CV-03-5985 (ARL)

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

NEXT MILLENNIUM REALTY, L.L.C and 101 FROST STREET ASSOCIATES' MEMORANDUM OF LAW IN SUPPORT OF PARTIAL SUMMARY JUDGMENT

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Plaintiffs, Next Millennium Realty, L.L.C. and 101 Frost Street Associates (collectively, the "Plaintiffs"), submit this Memorandum of Law in Support of their Motion for Partial Summary Judgment on the First, Second and Third Causes of Action contained in the Third-Amended Complaint pursuant to Fed. R. Civ. Proc. 56 for a judgment on liability against defendant Northern State Realty Co. ("Defendant" or "Tenant"),[1] as an owner under the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. Section 9601 et seq. ("CERCLA").

A. Preliminary Statement

When Congress enacted CERCLA, the undisputed intent of the legislation was to create a legal framework to require parties that created and/or profited from the activities that created environmental contamination to pay the cost of cleaning up the environment. New York v. Shore Realty Corp., 759 F.2d 1032, 1042-1043 (2d Cir. 1985). Moreover, CERCLA is a remedial statutory scheme and, therefore, its provisions must be construed liberally to effectuate its purpose. Commander Oil v. Barlo Equipment Company, 215 F.3d 321 (2d Cir. 2000), Cert denied, 531 U.S. 979 (2000).

In this case, it is undisputed that Defendant: (1) had significant indicia of ownership under the lease purchase agreement which establishes CERCLA owner liability under the standard set forth in the controlling Second Circuit decision of Commander Oil; (2) subleased the property located at 89 Frost Street in the Town of Hempstead ("89 Frost Street Site") to entities responsible for the creation of the adverse environmental conditions at the 89 Frost Street

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1 All defendants are related entities with common beneficial ownership, management and involvement

Site, without any involvement or consent of the landlord;[2] (3) was aware that the subtenant utilized significant amounts of organic solvents in its operations; and (4) profited substantially from its sublease with the polluting subtenant. Defendant's actions, by placing the polluting subtenant at the 89 Frost Street Site and allowing it to conduct manufacturing activities, have resulted in the creation of one of the most highly contaminated sites in the entire country. To date, the Defendant has not contributed to the remediation of the contamination that its actions facilitated and created. This is contrary to the intent of CERCLA which was specifically enacted by Congress to require parties that created and profited from events leading to the creation of environmental contamination, to contribute to the cost of remediating the site. New York v. Shore Realty Corp. at 1042-1043.

It is also undisputed that Plaintiffs, who are the successors to the landlord that leased the property to Defendant, as well as, Jerry Spiegel, the then owner and landlord: (1) had no involvement with the subtenant; (2) did not consent to the sublease; (3) did not profit from the sublease; and (4) did not engage in any manufacturing activity or the release of contamination at the 89 Frost Street Site. Nonetheless, Plaintiffs have incurred in excess of $8,000,000 remediating the condition created by the subtenant that Defendant allowed to occupy the 89 Frost Street Site, without the consent of the landlord.

In theory, the determination of Defendant's liability under CERCLA as an owner, for the actions of its subtenant, should be a straightforward exercise of evaluating the lease against the controlling legal standard set forth in Commander Oil. Instead, Defendant and its related defendants are attempting to complicate the analysis. Hiring, not one, but two experts to

[2] It is alleged, but disputed, that contamination was released at the 89 Frost Street property by defendants that also conducted manufacturing activities on the property prior to the sublease between 1966 and 1973. These allegations are contested and there are factual disputes concerning the disposal by the defendants at the 89 Frost Street Site.

engage in an analysis of the lease purchase agreement against the Commander Oil standard. It is respectfully submitted that the analysis of the clear and unambiguous terms of the lease purchase agreement against the standard established by the Second Circuit is within the exclusive domain of the Court and not hired experts.

Plaintiffs respectfully request that the Court engage in a direct comparison of the clear and unambiguous terms of the lease purchase agreement against the non-exclusive list of indicia of ownership factors outlined in Commander Oil, and consider other indicia of ownership granted to Tenant in the lease purchase agreement. Once this is done, Plaintiffs submit that Defendant had sufficient indicia of ownership under the lease purchase agreement to find it liable as an owner under CERCLA and to hold it accountable for its actions. This is not only the correct decision under the law, but also the correct equitable decision, as the party that placed the polluting subtenant at the 89 Frost Street Site will be required to contribute to the remediation of the contamination that its actions facilitated at the 89 Frost Street Site.

B. Statement of Undisputed Facts

1. Plaintiffs' Remediation of Site

Plaintiffs are the current owners of three properties designated by the New York State Department of Environmental Conservation ("NYSDEC") as State Superfund Sites, including the 89 Frost Street Site. The Records of Decisions ("RODs") for the three sites identify perchloroethylene (hereinafter "PCE") as a major contaminant of concern. PCE is a hazardous substance and has been released on the 89 Frost Street Site. Defendants' Rule 56.1 Counter Statement of Fact ("Def. Counter Statement") at ¶¶ 1-3.

Plaintiffs have entered into three Consent Orders with the New York State Department of Environmental Conservation agreeing to remediate the 89 Frost Street Site

("Consent Orders"). Plaintiffs have incurred costs remediating the 89 Frost Street Site pursuant to their Consent Order obligations. Certain of the costs incurred by Plaintiffs are consistent with the National Contingency Plan (hereinafter, "NCP"). Def. Counter Statement" at ¶¶ 4-6.

2. Lease Purchase Agreement for 89 Frost Street Site

On April 1, 1966, Jerry Spiegel ("Landlord"), the then owner of the 89 Frost Street Site, entered into a lease with a purchase option with defendant Pufahl Realty Corp. for the 89 Frost Street Site ("Lease Purchase Agreement"). Lease Purchase Agreement at Exhibit 3 to the Declaration of Kevin Maldonado dated January 28, 2014[3]; Def. Counter Statement at ¶¶ 7-8. On March 25, 1969, Pufahl Realty Corp. changed its name to Northern State Realty Corp. In May of 1973, Northern State Realty Corp. assigned the Lease Purchase Agreement to a newly formed general partnership called Northern State Realty Co. Def. Counter Statement at ¶¶ 9-10. At all relevant times, Charles Pufahl, Joseph Pufahl and Herman Pufahl (collectively, "Pufahl Brothers") shared beneficial ownership and management of the three entities that were tenants under the Lease Purchase Agreement. The Pufahl Brothers were the general partners of Defendant, Northern State Realty Co. Def. Counter Statement at ¶ 13.

Pursuant to the terms of the Lease Purchase Agreement, Landlord agreed to a build-to-suit arrangement with Tenant, whereby Landlord agreed to build a 55,000 square foot manufacturing facility for Tenant at the 89 Frost Street Site. Lease Purchase Agreement at ¶ 33 at Exhibit 3. The facility was to be constructed in accordance with plans and specifications approved by Tenant.[4]

[3] All future references to "Exhibits" refer to the Exhibits to the Declaration of Kevin Maldonado dated January 28, 2014.

[4] There are conflicting facts in the record as to whether the building was partially erected prior to the

3. Lease Purchase Agreement Terms Granting Indicia of Ownership

The Lease Purchase Agreement contains a number of terms and provisions that grant the Tenant indicia of ownership. The following Lease Purchase Agreement terms are demonstrative of the significant indicia of ownership granted to Tenant:

1. The Lease Purchase Agreement was a long term lease. It had an initial term of twenty years from completion of construction and tendering of Certificate of Occupancy to the Tenant. Lease Purchase Agreement at ¶ 36 at Exhibit 3; and Def. Counter Statement at ¶ 17. Following the initial lease term of twenty years, the Lease Purchase Agreement was automatically extended to a month to month lease for an additional indefinite term. Lease Purchase Agreement at ¶ 59 at Exhibit 3.

2. Pursuant to the Lease Purchase Agreement, Tenant could conduct its contemplated laminating operation or any other general manufacturing it desired from time-to-time without notice to Landlord and without obtaining Landlord's approval or consent. The only limitation on Tenant's use of the facility was a general requirement that Tenant must comply with applicable industrial zoning codes. Lease Purchase Agreement Addendum at ¶15 at Exhibit 3 and Def. Counter Statement at ¶ 19.

3. Lease Purchase Agreement was not subject to early termination by Landlord. The Lease Purchase Agreement provides that it terminates prior to the stated termination date only upon the occurrence of certain events beyond the Landlord's control, namely (1) Tenant's default: (2) loss or destruction of property by damage or condemnation; or (3) the Defendant's exercising of its purchase option for the property. These are the only

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execution of the Lease Purchase Agreement. It is undisputed that Landlord was required to construct a building on the 89 Frost Street Site that met the specifications approved by the Tenant in the Lease Purchase Agreement. Lease Purchase Agreement at ¶ 33 at Exhibit 3.

termination provisions[5] contained in the Lease Purchase Agreement. See Lease Purchase Agreement generally at Exhibit 3; and Def. Counter Statement at ¶¶ 21 and 22.

4. Tenant had right to sublet 89 Frost Street Site without notice to Landlord and without Landlord's consent. Any subtenant was required to enter into a recordable standard lease agreeing to accept the terms of the Lease Purchase Agreement. Lease Purchase Agreement at ¶ 34 at Exhibit 3. In fact, the sublease between Tenant and 89 Frost Leasing Corp. was made without notice to Landlord and without any consent or approval from Landlord. John Pufahl Dep. at 228:2-6 at Exhibit 10; Charles Pufahl Dep. at 105:22-106:10 at Exhibit 7; Margolin Dep. at 9:14-24 at Exhibit 6.

5. Pursuant to the Lease Purchase Agreement, Tenant was responsible for the payment of all property taxes, assessments, insurance premiums and utility costs. Lease Purchase Agreement at ¶¶ 2, 19, 28, 30, 35, 36, 44A, 58, 61, and 67 at Exhibit 3;. Def. Counter Statement at ¶¶ 26, 28, 29, 30, and 31.

6. The tenant was responsible for all maintenance costs such as removal of rubbish, snow and ice, and for landscaping. Def. Counter Statement at ¶ 35.

7. During the first two years of the Lease Purchase Agreement, Landlord guaranteed the quality and workmanship of the building it constructed by agreeing to make all repairs to the building. Def. Counter Statement at ¶ 36. After the first two years of the lease term, Landlord was responsible for making only those structural repairs to certain specifically enumerated structural elements of the building. These repairs where specifically limited

[5] For the sake of completeness it should be noted that the Lease Purchase Agreement was initially contingent on Landlord's ability to obtain financing to complete the construction of the facility. For the first six weeks following the execution of the Lease Purchase Agreement, but before Tenant took possession of the 89 Frost Street Site, Landlord had the right to terminate the Lease Purchase Agreement if financing could not be obtained. The condition precedent is not relevant to the Commander Oil analysis of the indicia of ownership.

to exterior and interior bearing walls, foundation, floor slab, roof deck and structural steel. Lease Addendum at ¶ 4 at Exhibit 3. Tenant was responsible for all other structural and non-structural repairs, such as repairs to the roof, mechanical, plumbing, heating, ventilating, air conditioning, sprinkler and sanitary systems, parking lot, doors and windows and for repairs of damage caused by the acts of the Tenant. Lease Purchase Agreement at ¶ 39; and Lease Purchase Agreement Addendum at ¶ 4 at Exhibit 3.

8. Landlord retained no right of possession for the 89 Frost Street facility. See Lease Purchase Agreement generally.

9. The Lease Purchase Agreement contained a purchase option exercisable during the 12th year of the lease. Lease Purchase Agreement at ¶ 65. Tenant was eager to obtain fee title to the property as part of the overall transaction. Miller Dep at 31:11-23, 70:15-24, 74:18-25, 107:15-108:3 at Exhibit 8; Def. Counter Statement at ¶¶ 14,15.

10. Tenant bore the risk of loss. All insurance proceeds were paid to Landlord and the Pufahl Defendants were not entitled to any compensation for the destruction of the Property by fire or condemnation. Lease Purchase Agreement at ¶ 12 at Exhibit 3.

11. Landlord was "exempt from any and all liability for any damage or injury to person or property caused by [or] resulting from steam, electricity, gas, water, rain, ice or snow, or any leak or flow from or into any part of said building [or] from any damage or injury resulting or arising from any other cause or happening whatsoever unless said damage or injury be caused by or be due to the negligence of the Landlord." Lease Purchase Agreement at ¶ 12 at Exhibit 3; Def. Counter Statement at ¶ 39. Landlord was not liable "whatsoever for any injury or damage to any property or to any person happening on or

about the demised premises, nor for any injury or damage to any property of Tenant, or of any other person contained therein." Lease Purchase Agreement at ¶ 60 at Exhibit 3; Def. Counter Statement at ¶ 40.

12. Tenant or its subtenant was in exclusive control over the 89 Frost Street Site and was in exclusive possession of the Property. Lease Purchase Agreement at ¶ 60 at Exhibit 3.

4. Sublease of 89 Frost Street Lease

In 1973, Northern State Realty Co. entered into a sublease (hereinafter "Sublease") with 89 Frost Leasing Corp. Sublease at Exhibit 4; Def. Counter Statement at ¶ 53. 89 Frost Leasing Corp. was an affiliated company to Marvex Corp. (hereinafter "Marvex or "Subtenant"), the party that occupied and conducted textile manufacturing activities at 89 Frost Street Site between 1973 and 1976. Sublease Rider at ¶ 11; Rental Invoice at AA00189 (Dec. 24, 1975) at Exhibit 5; Fred Margolin Dep. at 8:21—9:10 at Exhibit 6; 10:4—8; Charles Pufahl Dep. at 51:2—4, 70:11—16 at Exhibit 7; Elliot Miller Dep. at 117:7—9 at Exhibit 8; Dieter Kannapin Dep. at 8:21—9:6 at Exhibit 9 ; and Def. Counter Statement at ¶ 55.

Marvex occupied the 89 Frost Street Site and conducted operations at the property pursuant to the terms of the Sublease. Margolin Dep. at 8:21—9:10, 10:4—8 at Exhibit 6; Charles Pufahl Dep. at 51:2—4, 70:11—16 at Exhibit 7; Elliot Miller Dep. at 117:7—9 at Exhibit 8; Def. Counter Statement at ¶ 56.

Landlord had no involvement with the Sublease. John Pufahl Dep. at 228:2—6 at Exhibit 10; Charles Pufahl Dep. at 105:22—106:10 at Exhibit 7; Margolin Dep. at 9:14—24 at Exhibit 6. Landlord had no involvement with the placement of the Subtenant in the 89 Frost Street Site. John Pufahl Dep. at 228:2—6 at Exhibit 10; Charles Pufahl Dep. at 105:22—106:10

at Exhibit 7; Margolin Dep. at 9:14—24 at Exhibit 6; Def. Counter Statement at ¶ 58. Landlord was not requested to consent to the sublet of the 89 Frost Street Site to Subtenant and did not consent to the sublet of the Property to Subtenant. John Pufahl Dep. 228:7-9 at Exhibit 10.

Subtenant agreed to pay $113,100 in annual base rent for the first two years and $121,800 in annual base rent thereafter to the Defendant from 1975 to 1986. Sublease at page 2 at Exhibit 4; Def. Counter Statement at ¶ 61. Tenant paid Landlord $55,565 in annual rent under the Lease. See Lease Purchase Agreement at ¶¶ 33, 38 at Exhibit 3. All of the profit derived from the Sublease was received and retained solely by Tenant. The gross profit realized by Tenant pursuant to the Sublease amounted to approximately $57,500 per year for the first two years and $66,000 per year thereafter. Landlord did not share in any of the profits derived by the Tenant from the Sublease of the 89 Frost Street Site. Sublease at page 2 at Exhibit 4; Def. Counter Statement at ¶ 62. The Sublease was for a term of the balance of the Lease. Sublease at page 1 at Exhibit 4; and Def. Counter Statement at ¶ 63.

5. Marvex's Use and Disposal of PCE at the 89 Frost Street Site

The Tenant, through its principals and related parties, was aware of the use of PCE by its subtenant Marvex at the 89 Frost Street Site. John Pufahl Dep. at 90:3—14 at Exhibit 10; Charles Pufahl Dep. at 54:9—17 at Exhibit 7; Margolin Dep. at 14:24—15:9 at Exhibit 6; Bernard T. Delaney Expert Opinion at 5 at Exhibit 11; Letter from Daniel Riesel, legal counsel for Adchem Corp., to New York State Department of Environmental Conservation, at page 3 (Aug. 2, 1996) at Exhibit 12. Specifically, John Pufahl observed the operations of Marvex utilizing PCE at the Property. John Pufahl Dep. at 88:23—90:17, 93:5—17 at Exhibit 10; Def. Counter Statement at ¶¶ 65 and 66.

It is not disputed that either through its manufacturing activity or following a fire that destroyed the Marvex dry cleaning equipment, Marvex contributed PCE to the 89 Frost Street Property. Bernard T. Delaney Expert Opinion at 5, 16, 18, 21 at Exhibit11; Fred Margolin Dep. at 15:2—9 at Exhibit 6; Charles Pufahl Dep. at 54:9—17 at Exhibit 7; Dieter Kannapin Dep. at 16:18—24 at Exhibit 9; Def. Counter Statement at ¶ 73.

C. Legal Argument

1. Summary Judgment Standard

Summary judgment is appropriate where there are no genuine disputes concerning any material facts, and where the moving party is entitled to judgment as a matter of law. Jamaica Ash & Rubbish Removal Co. v. Ferguson, 85 F.Supp.2d 174, 180 (E.D.N.Y. 2000); Fed.R.Civ.P. 56(c); and Celotex Corp. v. Catrett, 477 U.S. 17, 322, 106 S.Ct. 2548 (1986)). "An issue of fact is genuine if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' A fact is material if it 'might affect the outcome of the suit under the governing law.'" Roe v. City of Waterbury, 542 F.3d 31, 35 (2d Cir. 2008) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

Furthermore, "[a] party opposing summary judgment does not show the existence of a genuine issue of fact to be tried merely by making assertions that are conclusory or based on speculation." *Id; citing Major League Baseball, Inc. v. Salvino, Inc.*, 542 F.2d 290, 310 (2d Cir. 2008). See Fed. R. Civ.P. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."); *Continental Insurance Co. v. Atlantic Casualty Insurance Co.*, 2009 WL 1564144 (S.D.N.Y.

2009) ("The non-moving party cannot . . . 'escape summary judgment merely by vaguely asserting the existence of some unspecified disputed material facts, or defeat the motion through mere speculation or conjecture.'") (Citations omitted).

In this case there is no opportunity for the creation of material issues of fact as the Lease Purchase Agreement speaks for itself and its terms are to be weighed against the factors enumerated in the Commander Oil decision and evaluated for other indicia of ownership granted to the Tenant pursuant to the terms of the document.

2. CERCLA Liability

To prevail on its claim for contribution under CERCLA, Plaintiffs must prove: (1) the 89 Frost Street Site is a facility as defined by 42 U.S.C. Section 9601(9); (2) hazardous substances have been released at the 89 Frost Street Site; (3) at the time of the release, Defendant was an owner or operator under Section 9607; (4) Plaintiffs incurred response costs; (5) the response costs incurred, and to be incurred by the Plaintiffs are consistent with the requirements of the National Contingency Plan ("NCP"). CERCLA 42 U.S.C. Section 9601 et seq.

In this case, Defendant has conceded that: (1) the 89 Frost Street Site is a facility (Def. Counter Statement at ¶1); (2) hazardous substances were released at the 89 Frost Street Site (Def. Counter Statement at ¶¶ 2, 3, 72 and 73); (3) Plaintiffs incurred response costs (Def. Counter Statement at ¶¶ 4 and 5); and (4) some of the costs incurred are consistent with the NCP (Def. Counter Statement at ¶ 6).

Defendant is disputing that it is an owner under CERCLA Section 9607.

Additionally, there are material issues of fact as to whether Defendant, acting individually or in concert with other defendants, is an operator under CERCLA. Accordingly, the sole issue before the Court on this motion is whether Defendant has liability under CERCLA as an owner.

3. Owner Liability Under CERCLA

It is well settled law in the Second Circuit that a Tenant may have CERCLA liability as an owner and be strictly liable. The Court in Commander Oil stated that it did "not foreclose the possibility that in some circumstances lessees/sublessors may be liable under CERCLA. Certain lessees may have the requisite indicia of ownership vis-vis the record owner to be *de facto* owners and therefore strictly liable." Commander Oil at 330.

The Commander Oil court went on to enumerate a non-exclusive list of five "important" "factors that might transform a lessee into an owner." Id. These factors include:

> (1) Whether the lease is for an extensive term and admits of no rights in the landlord to determine how the property is used;
>
> (2) Whether the lease can be terminated by the landlord before it expires by its terms;
>
> (3) Whether the tenant has the right to sublet all or some of the property without notifying the landlord;
>
> (4) Whether the tenant is responsible for payment of all taxes, assessments, insurance, and operation and maintenance costs; and
>
> (5) Whether the tenant is responsible for making all structural and other repairs.

Id. at 330-331.

When the provisions of the Lease Purchase Agreement are evaluated under the Commander Oil test, the "ownership" status of Defendants is inescapable. The Lease contains many more indicia of ownership than the Commander Oil court requires for converting a lessee into an owner under CERCLA.

a. Lease term and use restrictions.

The Lease Purchase agreement had an initial term of twenty years from completion of construction and tendering of Certificate of Occupancy to the Tenant. Following the initial twenty-year term, the Lease Purchase Agreement was automatically converted to a month to month lease for an additional indefinite term.

This is contrasted with the lease term in Commander Oil that had a relatively short five- year term with a single renewal.

Defendant's own lease expert, Jack O'Connor, testified that a twenty-year lease would be considered a long-term lease in his opinion. During his deposition he was asked: Q. "Would a 20-year lease be a long-term lease?" A. "Yes it would." Jack O'Connor Dep. at 47:17-19 at Exhibit 13.

The Connecticut District Court has held that a 25-year lease term satisfies the Commander Oil lease term test and is an indicia of ownership. Pateley Associates I, LLC v. Pitney Bowes, Inc. 704 F.Supp. 2d. 140, 145 (Conn. 2010) (25-year lease term is an indicia of ownership and distinguishable from Commander Oil lease term).

A good indicator that a twenty-year lease with a purchase option does reflect a transfer of ownership interest is that New York's taxing authority would treat the Lease Purchase Agreement arrangement as a transaction triggering a tax on transfer of ownership interest. New York State Tax Regulations 20 NYCRR 575.7(c)(1). This provides additional evidence that a twenty-year lease with a purchase option creates an ownership interest.[6]

It is respectfully submitted that the Lease Purchase Agreement with a twenty-year lease

[6] The lease in Commander Oil would not trigger the transfer tax.

term, plus an indefinite month to month renewal term, and a purchase option satisfies the "extensive term" test outlined in the first factor enumerated in Commander Oil and grants the Tenant a substantial indicia of ownership.

Commander Oil also states that the Landlord's right to determine how the property can be used should be considered. The use restrictions contained in the Commander Oil lease stands in stark contrast to the use provision of the Lease Purchase Agreement. Under the Commander Oil lease, the tenant was specifically limited to activities it already conducted on the leased lots. Commander Oil at 331. It was not permitted to expand or change its operations beyond the business of buying, manufacturing and distributing petroleum-handling equipment. Id. at 324 and 331.

Unlike the restrictive use provision in the Commander Oil lease, the Lease Purchase Agreement contains no restrictions on the industrial manufacturing activities that Tenant could conduct on the on the 89 Frost Street Site. Tenant was permitted to engage in all general manufacturing activities, consistent with applicable zoning. Lease Addendum at ¶ 15 at Exhibit 3. If at any point in the lease term Tenant desired to conduct any other manufacturing activity that complied with industrial zoning, it was permitted to do so without notice to the Landlord and without any approval or consent from Landlord. The Commander Oil tenant did not have this right and was restricted to its present activities.

It is respectfully submitted to the Court that the Tenant's ability to conduct any industrial manufacturing which complies with zoning without restriction, and its ability to change its manufacturing activities at will, without notice to the Landlord and without Landlord's approval or consent, is another indicia of Tenant's ownership under the Lease

Purchase Agreement. This is particularly true when the use provisions are compared to the restrictive use provisions in the Commander Oil case.

b. Lease termination.

The second factor enumerated by the Commander Oil Court is the ability of the Landlord to terminate the lease. In this case, after the first six weeks of the lease term, the Lease Purchase Agreement is not subject to early termination by Landlord. It could only be terminated for events beyond the Landlord's control, namely, (1) Tenant's default: (2) loss or destruction of property by damage or condemnation; or (3) the Defendant's exercise of its purchase option for the property. Lease generally; and Def. Counter Statement at ¶¶ 21 and 22.

Importantly, none of the lease termination provisions allow Landlord to terminate the Lease Purchase Agreement without an intervening event. The termination events are all beyond Landlord's control. Landlord had no ability to cancel the Lease Purchase Agreement unless Tenant defaulted on its obligations, the property was destroyed, the property was condemned or the Tenant exercised its purchase option.

Accordingly, the second enumerated factor in Commander Oil is satisfied as Landlord did not have termination rights. The Landlord's inability to terminate the Lease Purchase Agreement, except on limited circumstances that are out of his control, is an additional indicia of Tenant's ownership for CERCLA liability.

c. Subletting without consent.

Pursuant to the Lease Purchase Agreement, Tenant had the right to sublet the 89 Frost Street Site without notice to Landlord and without Landlord's consent. In fact, Tenant did sublet the 89 Frost Street Site without notice to Landlord and without Landlord's consent. There were not restrictions on subletting other than a requirement that any subtenant enter into a

recordable standard lease agreeing to accept the terms of the Lease Purchase Agreement. Lease Purchase Agreement at ¶ 34 at Exhibit 3; Def. Counter Statement at ¶¶ 23 and 25. Moreover, the Lease Purchase Agreement permitted a subtenant to engage in any manufacturing activity that complied with industrial zoning.

The sublet provision of the Lease Purchase Agreement stands in stark contrast to the Commander Oil sublet provisions which required the tenant to obtain landlord's "written approval" to sublet the property. Additionally, the sublet provision in Commander Oil had an extremely limiting sublet use provision. The property (an oil storage facility) could not be sublet to any party in the oil business. Commander Oil at 331.

The unrestricted subletting provisions contained in the Lease Purchase Agreement, which permit the sublet of the property to any industrial manufacturing subtenant without Landlord consent satisfies the third factor enumerated in Commander Oil and grants Tenant another significant indicia of ownership.

d. Payment of taxes assessments insurance and operation and maintenance.

Pursuant to the terms of the Lease Purchase Agreement, Tenant was responsible for the payment of all property taxes, assessments, insurance premiums and utility costs. Lease Purchase Agreement at ¶¶ 2, 19 ,28, 30, 35, 36, 44A, 58, 61, and 67 at Exhibit 3; Def. Counter Statement at ¶¶ 26, 28, 29, 30, and 31. Landlord remained responsible for non-real estate related taxes such as inheritance, income and franchise taxes. Def. Counter Statement at ¶ 26. The Tenant was responsible for all maintenance costs such as removal of rubbish, snow and ice, and for landscaping. Def. Counter Statement at ¶ 35.

This was similar to the arrangement in Commander Oil with one significant

difference. In Commander Oil Landlord paid the property taxes and tenant paid only the tax increases. Commander Oil at 331-332. In the Lease Purchase Agreement, Tenant was solely responsible for paying all the real estate taxes and assessments.

The Tenants obligation to pay all property taxes, assessments, insurance premiums and utility costs and to perform and pay for all maintenance pursuant to the Lease Purchase Agreement satisfies the fourth factor enumerated in Commander Oil and is an additional indicia of ownership by Tenant under CERCLA.

e. Structural and nonstructural repairs.

The obligation to make structural and nonstructural repairs to the 89 Frost Street Site are contained in Lease Purchase Agreement at paragraph 39 as amended by Addendum paragraph 4. Pursuant to the Lease Purchase Agreement, Landlord provided Tenant with a newly constructed building and paragraph 39 is a guarantee of the labor and materials of the construction. Paragraph 39 is specifically entitled "Guarantee of Labor and Materials".

Accordingly, as part of the guarantee of the quality of material and workmanship of the building he construction, Landlord agreed to be responsible for all repairs, structural and non-structural for the first two years of the lease term. Lease Purchase Agreement at ¶ 39. After the first two years of the lease term, Landlord was responsible for making only those structural repairs to certain specifically enumerated structural elements of the building, i.e., exterior and interior bearing walls, foundations, floor slab, roof deck and structural steel. Tenant was responsible for all other structural and non-structural repairs, such as repairs to the roof, mechanical, plumbing, heating, ventilating, air conditioning, sprinkler and sanitary systems, parking lot, doors and windows and for repairs of damage caused by the acts of the Tenant. Lease Purchase Agreement at ¶ 39; and Lease Purchase Agreement Addendum at ¶ 4.

Commander Oil did not address the situation involving a landlord's guaranty of a newly constructed building, as in our case. The Commander Oil court considered only the respective repair obligations of the parties in previously occupied properties and determined that the assumption of repair liability by a tenant was an indicia of ownership for CERCLA liability. In our case, the Tenant assumed the responsibility for all repairs, both structural and non-structural, except for those components of the building that the Landlord, as the builder of the building, guaranteed for an extended period.

f. Additional indicia of ownership under Lease Purchase Agreement

In addition to the enumerated list of five factors specified by the Second Circuit as important in determining indicia of ownership, the Second Circuit mentions in dicta other facts it considered as part of the analysis. These included: (1) the landlord's retention of use of the property; (2) the placement of the polluting subtenant on the property; and (3) the lack of profit from the sublease for the tenant. Commander Oil at 324-325 and 331.

In Commander Oil the landlord retained the right to use three oil storage tanks, office space and the placement of an aerial on the roof. The Second Circuit deemed this to be a retention "of the rights and obligation of ownership". Commander Oil at 331.

In this case, Landlord did not retain any right of possession or use for the 89 Frost Street Site. See Lease Purchase Agreement generally. The grant of full use and possession of the 89 Frost Street Site to the Tenant creates an additional indicia of ownership for the Tenant.

The Tenant's right and ability to put a subtenant into possession of property is an indicia of ownership. The Second Circuit noted in Commander Oil that it was the landlord, not the tenant, who placed the polluting party in possession of the property pursuant to a sublease. Commander Oil at 324. This is significantly different from the facts of this case where the

Tenant placed the polluting Subtenant at the 89 Frost Street Site, without the consent or involvement of the Landlord. The right and ability of tenant to place the Subtenant into possession of the 89 Frost Street Site, without notice to or consent by Landlord, is indicative of ownership.

The right and ability to profit from the leasing of a property is a fundamental right associated with the ownership of property. In Commander Oil the Tenant received a small or no profit from the sublease and most of the profit was passed through to the landlord. Commander Oil at 325. This is significantly different from the facts of this case where the Tenant received a substantial profit of between $57,500 and $66,000 annually from the sublease. This is more than a 100% return on what Tenant was paying Landlord for base rent. Landlord did not share in any of the profit from the sublease. Def. Counter Statement at ¶¶ 61-62.

The Tenant's right and ability to profit from the sublease is indicative of an ownership interest.

Last, but not least, the existence of the purchase option coupled with the Defendant's eagerness to own the 89 Frost Street Site, is a substantial indicia of ownership. This was a provision aggressively negotiated into the Lease Purchase agreement by Defendant's predecessor and the attorney drafting the deal indicated Defendant was eager to obtain.

In conclusion, when the indicia of ownership granted to the Tenant pursuant to the Lease Purchase Agreement are compared to the five non-exclusive enumerated factors in Commander Oil, and the Court considers other indicia of ownership granted to the Tenant pursuant to the Lease Purchase Agreement, it is respectfully submitted to the Court that Defendant is liable as an owner under CERCLA and controlling Second Circuit law.

Dated: January 28, 2014
Windham, New York

____/S_____
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